

Constitutional Law - Right to Counsel

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only to the most revolting forms of hard-core pornography. Anything less than hard-core pornography is probably protected.

The Supreme Court undoubtedly realizes that these publishers of "smut" are merely disseminators of dirt for money's sake and are totally unconcerned with the exposition of new ideas. But the Court considers the free speech guarantee so vital to a democratic society that it tolerates such an assault on the morality of our society. The wisdom of such a balancing of interests should not be criticized too severely, if at all, when the object of such publications is an adult audience. For upon maturity it is presumed that a person has acquired the wisdom and judgment necessary to discipline his percipient habits, and the law's concern should be only with conduct that affects society directly, and not with the morality of its individual citizens. What concerns this writer is the Court's hesitance to recognize that an expression's distributive freedom is limited where its primary audience is incapable of reasoned judgment. For although it is presumed that an adult is capable of mature judgment, it is obvious that the inquiring and immature mind of a child should be channeled and protected until it develops at least a youthful maturity. It is hoped that the Supreme Court will soon affirm and define the position it took in the *Butler* case.

CONSTITUTIONAL LAW—RIGHT TO COUNSEL

INTRODUCTION

In the last three decades we have witnessed the rise of two political ideologies—first fascism and now communism—both bent on world domination. Although anathema to each other each shared the basic concept that the right of the individual must be completely subservient to the interests of the state. During these same three decades this country (partially through its legislatures but primarily through its judiciary) has adopted procedures which scrupulously protect the substantive rights of the individual. It would seem that, viewing the abuses of the police state, we in this country felt compelled to set up these procedural safeguards lest our rights too would suffer violation at the hands of the state. In establishing these safeguards we have given the concept of individual rights more meaning and significance than it ever had before in history.

Thus, for example, an individual's right against self-incrimination is protected by the refusal of the courts to admit into evidence a confession which has been coerced.¹ Evidence illegally seized is also inadmissible,

¹ *Brown v. Mississippi*, 297 U.S. 278 (1936).

thereby making significant the individual's right to privacy.² Today one convicted of a crime is no longer denied the right to appeal an error on the part of the trial court solely on the ground that he cannot afford a transcript of the record,³ thus rendering more important one's right to equal protection of the laws.

This comment deals with one of the most important of these recent procedural developments: the right of one accused of a crime to aid of counsel. Without this procedural right, the others are little more than empty words. For the layman by himself is often unable to make use of his procedural rights either because he is unaware of them or because he lacks the legal skill and knowledge to invoke them properly. Of what value are these rights if they are not effectively utilized?

This discussion is divided into three separate sections—(1) *Rights at Trial*. (2) *Rights Prior to Trial*. (3) *Rights on Appeal*. Each part is further subdivided into federal and state practice, in an attempt to give the reader an overall view of the state of the law today with a prediction as to its state tomorrow.

I. RIGHTS AT TRIAL

A. Federal Practice

The sixth amendment to the Federal Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Prior to 1938, it was generally thought that this amendment only guaranteed a defendant in a Federal trial the right to *secure* counsel. In *Johnson v. Zerbst*⁴ the United States Supreme Court, noting that this right is illusory in the case of indigent defendants, held that such defendants had a right to have counsel *appointed* in both capital and non-capital cases. Three years later, in *Glasser v. United States*,⁵ the Court held that in all federal prosecutions it was the duty of the trial court to advise the accused of his right to counsel and failure to so do constituted reversible error. Today these decisions are codified in Rule 44 of the Federal Rules of Criminal Procedure: "If the defendant appears in court without counsel the court shall advise him of his right to counsel and assign him counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."

B. State Procedure

In state prosecutions, the accused must look to the state constitution and statutes, operating in conjunction with the fourteenth amendment, for whatever rights he has to the services of an attorney at his trial. Every

² *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ 304 U.S. 458 (1938).

³ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵ 315 U.S. 60 (1941).

state, with the exception of Virginia, has a specific constitutional provision declaring that in criminal prosecutions the accused shall have the right to secure the assistance of counsel,⁶ and three states have constitutions which provide for the appointment of counsel in the case of indigent defendants.⁷ While the statutes of the states vary greatly, the majority provide for the appointment of counsel for indigent defendants in both capital and non-capital cases.

In 1960 Mr. Justice Douglas appended to his concurring opinion in *McNeal v. Culver*⁸ a compilation of the states which by statute or constitution provide for the appointment of counsel. Of the total number compiled, thirty-five states provide for appointment of counsel on behalf of an indigent in any felony case, whereas the other fifteen states vary in their provisions, some making no explicit provision for appointment of counsel. Of these, some make provision for appointment only in capital cases, while the others leave the question of appointment to the discretion of the trial judge.

The vast majority of the jurisdictions recognize that the right to counsel is of little value to an individual accused of a crime if he is ignorant of that right. Accordingly, either by statute,⁹ or judicial decision,¹⁰ the majority of jurisdictions impose upon the trial court the duty to inform a person charged with a criminal offense at, or prior to, his arraignment, of his right to be represented by counsel. On the other hand, a substantial minority of the courts¹¹ have held that the committing magistrate is under no obligation to inform the accused of his rights.

The Federal Constitution also offers safeguards as to the appointment of counsel in state criminal proceedings. It is important to note, however, that these safeguards rest upon the due process clause of the fourteenth amendment. The Supreme Court has not as yet interpreted the fourteenth as incorporating the sixth amendment.¹² Therefore the Constitution, as

⁶ For example, see ILL. CONST. art II, § 9 (1870).

⁷ IND. CONST. art. I, § 13 (1851); KY. CONST. § 11 (1891); N.J. CONST. art. I, § 10 (1947).

⁸ 365 U.S. 109 (1961).

⁹ For example: ILL. REV. STAT. ch. 110, § 101.26 (1961).

¹⁰ *People ex. rel. Moore v. Hunt*, 258 App. Div. 24, 16 N.Y.S. 2d 19 (1939).

¹¹ *State ex. rel. Welper v. Rigg*, 254 Minn. 10, 93 N.W. 2d 198 (1958); *State v. Jacobson*, 28 N.J. Super. 226, 100 A. 2d 330 (1953); *Pennington v. Smith*, 35 Wash. 2d 267, 212 P. 2d 811 (1949).

¹² In *Betts v. Brady*, 316 U.S. 455 (1942), the Court in a 6-3 decision explicitly held that the sixth amendment was not incorporated into the fourteenth. On the other hand, a growing minority of the Supreme Court has taken the view that the guarantee of the sixth amendment as to assistance of counsel is embodied in the fourteenth amendment, and that all persons charged with crimes are entitled to an attorney under the sixth and fourteenth amendments. See *Pennsylvania ex. rel. Herman v. Claudy*, 350 U.S. 116 (1956).

interpreted thus far, does not impose a duty upon the state courts, as it does upon the federal courts, to provide counsel in every case where the defendant is unable to retain an attorney.¹³

The due process clause of the fourteenth amendment does demand that the state appoint counsel in all capital cases where the accused would, but for such appointment, be unable to be represented by an attorney.¹⁴ So, too, in state proceedings involving non-capital cases, the fourteenth amendment demands that the court appoint counsel for those whose trial without counsel would be "offensive to the common and fundamental ideas of fairness and right."¹⁵ This theory was established in *Betts v. Brady*,¹⁶ where it was held that the Constitution does not guarantee every defendant charged with a non-capital offense in a state court, regardless of the circumstances, the right to have counsel appointed. However, in cases where the defendant is so unduly prejudiced by the absence of an attorney that he is deprived of his liberty, in violation of due process, a conviction under such circumstances will be reversed. Thus, in *De Meerleer v. Michigan*,¹⁷ the defendant, a seventeen-year-old boy charged with first degree murder (a non-capital offense in that state), was on the same day arraigned, tried, convicted and sentenced to life imprisonment. Upon a plea of guilty he was neither offered counsel nor advised of his right to retain an attorney. No evidence was introduced on his behalf and none of the state's witnesses were subjected to cross-examination. The United States Supreme Court reversed the conviction on the ground that the petitioner had been deprived of counsel, a right which under the circumstances, the Court deemed essential to a fair trial.

In contradistinction, in *Gryger v. Burke*¹⁸ the fact that the accused was not offered counsel or told of his right to counsel was found not to justify a reversal of conviction. The Supreme Court, taking cognizance of the fact that the defendant had eight previous convictions and was represented by counsel in two of the prosecutions, held that as a habitual criminal he must have known of his rights to counsel and therefore could not have been prejudiced.

The logic for this distinction between capital and non-capital offenses is not apparent. First, the fourteenth amendment speaks equally of life, liberty and property. Secondly, it would seem difficult if not impossible for the Supreme Court, looking at the record of the trial court, to tell with any degree of accuracy whether or not the accused has been

¹³ *Betts v. Brady*, 316 U.S. 455 (1942).

¹⁴ *De Meerleer v. Michigan*, 329 U.S. 663 (1947); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁵ *Betts v. Brady*, 316 U.S. 455, 473 (1942).

¹⁶ 316 U.S. 455 (1942).

¹⁷ 329 U.S. 663 (1947).

¹⁸ 334 U.S. 728 (1948).

prejudiced.¹⁹ "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."²⁰

It has been suggested by one writer,²¹ basing his opinion on language found in recent decisions, that the Court will reverse the decision in the *Betts* case at the next opportunity which presents itself. A reversal would seem to be more probable than not since the retirement of Mr. Justice Frankfurter and Mr. Justice Whittaker, two members of the court who have definite conservative views. Thus, a defendant's rights would no longer depend upon whether or not he was being tried for a capital or non-capital offense.

Regardless of whether a defendant has a right to *appointed* counsel in state proceedings, the fourteenth amendment gives him an absolute guarantee to be heard through his *own* counsel.²² Furthermore, he must be given a reasonable opportunity to employ and consult with counsel; without this opportunity his right to be heard through counsel would be worthless.²³ In *Chandler v. Fretag*²⁴ the petitioner was indicted in a Tennessee court for housebreaking and larceny, punishable by a prison term of three to ten years. At the trial he appeared without counsel and pleaded guilty. He was then advised that because of three prior felony convictions he would also be tried as a habitual criminal. A conviction upon that charge would have subjected him to life imprisonment. He asked for a continuance to enable him to obtain counsel on the habitual criminal charge. The request was denied and he was convicted. He applied to the state court for a writ of habeas corpus and was refused. The United States Supreme Court reversed the state court, holding that "regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."²⁵

¹⁹ "Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented." *Betts v. Brady*, 316 U.S. 455, 476 (1942) (dissenting opinion).

²⁰ *Glasser v. United States*, 315 U.S. 60, 76 (1941). The words of this quotation were written to apply to federal court proceedings. However, as Justice Black pointed out in *Crooker v. California*, 357 U.S. 433 (1958) (separate opinion), it would be equally applicable to state proceedings.

²¹ Beany, *The Effective Assistance of Counsel*, FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 39 (1959); In *Crooker v. California* 357 U.S. 433 (1958), four dissenting Justices repudiated the doctrine of *Betts v. Brady*. This fact suggested to Beany that had the case involved right of counsel at trial instead of prior to trial, the majority of the Justices would have decreed the right to be an absolute one.

²² *Chandler v. Fretag*, 348 U.S. 3 (1954).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Id.* at 9.

II. RIGHTS PRIOR TO TRIAL

A. Federal Proceedings

Prior to 1858, the defendant in a federal criminal prosecution was not entitled to retain counsel at the preliminary hearing.²⁶ This procedure was altered in *U.S. v. Bollman*.²⁷ Today the federal practice is that "the commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. . . . The commissioner shall allow the defendant reasonable time and opportunity to consult counsel."²⁸ Until the accused is arraigned before the trial court the right to *assigned* counsel does not exist.²⁹

The Federal Rules of Criminal Procedure require only that the commissioner on preliminary examination inform the accused of his right to retain counsel and allow him reasonable time and opportunity to consult with counsel. It does *not* require him to *assign* counsel at this stage of the proceedings. Rule 44 which provides for the arraignment of counsel was "intended to indicate that the right of the defendant to have counsel assigned by the court relates only to proceedings in the court and, therefore, does not include the preliminary proceedings."³⁰

B. State Proceedings

The laws of the states in regard to the rights of an accused to counsel prior to trial vary greatly. Some states have enacted statutes which allow the accused to have retained counsel at the preliminary hearing.³¹ Other states, through their courts, have declared that in the absence of a statute the accused is not entitled to secure the aid of an attorney.³² Others again have taken a contrary view.³³ California, by statute, requires a judge to

²⁶ *In re Bates*, 2 Fed. Cas. 1015 (No. 1099a) (S.C.D.C. 1858).

²⁷ 24 Fed. Cas. 1189 (No. 14622) (C.C.D.C. 1807).

²⁸ Fed. R. Crim. P. 5 (b).

²⁹ *Council v. Clemmer*, 177 F. 2d 22 (D.C. Cir.), *cert. denied*, 338 U.S. 880 (1949); *Setser v. Welch*, 159 F. 2d 703 (4th Cir.), *cert. denied*, 337 U.S. 840 (1947).

³⁰ Fed. R. Crim. P. 44 n. 2.

³¹ For example: N.C. GEN. STAT. ANN. § § 15-87, 15-88 (1961); FLA. STAT. § § 902.01-03 (1959).

³² *Hawk v. State*, 151 Neb. 717, 39 N.W. 2d 561 (1949); *People v. Rebolledo*, 93 Cal. App. 2d 261, 209 P. 2d 16 (1949); *Roberts v. State*, 145 Neb. 658, 17 N.W. 2d 666 (1945); *Lyons v. State*, 77 Okla. Crim. 197, 138 P. 2d 142 (1943); *Blanks v. State*, 30 Ala. App. 519, 8 So. 2d 450 (1942); *People v. Campos*, 10 Cal. App. 2d 310, 52 P. 2d 251 (1935); *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493 (1910).

³³ *State v. Braasch*, 229 P. 2d 289 (Utah 1951), *cert. denied*, 342 U.S. 910 (1952); *Ex parte Barnett*, 67 Okla. Crim. 300, 94 P. 2d 18 (1939); *Phillips v. State*, 162 Ark. 541, 258 S.W. 403 (1924); *People v. Fuller*, 68 N.Y. Supp. 742 (1901); *People v. Napthaly*, 105 Cal. 641, 39 Pac. 29 (1895).

appoint counsel for an indigent at the preliminary hearing upon request.³⁴ The vast majority of the states have held that the accused is entitled to retained counsel at the arraignment where he is forced to make a decision as to his plea.³⁵

The right to counsel as guaranteed by the fourteenth amendment is not limited to the actual trial; it extends to the pretrial stage, provided the defendant is in fact prejudiced by the absence of counsel to such an extent that it effects the subsequent trial.³⁶ In *Crooker v. California*,³⁷ the petitioner asked for an attorney before confessing to a murder. His request was denied and he was subsequently convicted, the confession being introduced as evidence. In a five to four decision, the U.S. Supreme Court affirmed his conviction, setting forth the principle that deprivation of counsel in a pretrial proceeding is a violation of due process only if the petitioner is thereby so prejudiced as to infect his subsequent trial with an absence of "that fundamental fairness essential to the very concept of justice." The Court concluded that since the petitioner was a college graduate, had one year of law school and knew of his right to remain silent, he could not have been prejudiced to such a degree. The minority of the Court expressed the opinion that the one accused of a crime should be given the absolute right to consult with an attorney during the interrogation.

In a recent case,³⁸ a petitioner who was convicted in an Alabama court for a capital crime appealed, claiming that the denial of counsel at the preliminary hearing constituted a denial of due process. Under Alabama law the following must be pleaded or waived at arraignment: the defense of insanity, the plea in abatement and the motion to quash based on the ground that the jury was improperly drawn. The Supreme Court held that here the arraignment was so critical a stage of criminal proceedings that denial of counsel required reversal even though no prejudice was shown. Thus, where the arraignment and trial are closely connected there is an *absolute right* to counsel, at least in capital cases. This certainly seems to be the reasonable solution in the problem of right to counsel. However, it would be a mistake to extend this absolute right to the interrogation stage. "The only function counsel could have at this time of the suspect's

³⁴ CAL. PENAL CODE § 859 (1962).

³⁵ *Winn v. State*, 232 Ind. 70, 111 N.E. 2d 653 (1953); *Ex parte Stone*, 255 S.W. 2d 155 (Mo. Ct. App. 1953); *State v. Lindsey*, 231 Ind. 126, 106 N.E. 2d 230 (1952); *In re Sobongy*, 18 N.J. Super. 334, 87 A. 2d 59 (1952); *Johnson v. State*, 79 Okla. Crim. 363, 155 P. 2d 259 (1945); *People v. Terry*, 366 Ill. 520, 9 N.E. 2d 322 (1937). *Contra*, *People v. Crandell*, 270 Mich. 124, 258 N.W. 224 (1935).

³⁶ *Crooker v. California*, 357 U.S. 433 (1958).

³⁷ *Ibid.*

³⁸ *Hamilton v. Alabama*, 368 U.S. 52 (1962).

interrogation would be to instruct him to 'keep his mouth shut.'³⁹ This would be so whether the information which the suspect had was incriminating or not. It would seem that this rule of preventing interrogation of those who have relevant information would be disastrous should the court ever adopt it.⁴⁰ At the interrogation stage the only adverse effect which lack of counsel could result in is a confession. If the confession is coerced, it will not be admissible and the defendant will not be prejudiced thereby. If the confession is not coerced what social objective can we hope to achieve by denying the police an opportunity to obtain it? Should we adopt the rule espoused by the dissenters in the *Crooker* case, we would in all probability create havoc in our law enforcement system.

III. RIGHTS ON APPEAL

A. Federal Practice

The cases prior to 1956 held that there was no constitutional right to the appointment of counsel;⁴¹ however, the court had authority to do so at its discretion.⁴² Possibly this is the law today.

In *Griffin v. Illinois*,⁴³ the Supreme Court of the United States declared that a state's failure to provide a transcript of the trial to an indigent defendant was unconstitutional. The rationale of the decision was that in failing to provide a free transcript the state was denying appellate review to a certain class of citizens, thereby denying both due process and equal protection. By analogy, it would seem that it is a violation of due process and equal protection for either state or federal government to deny appointed counsel to indigent prisoners in order that the transcript might be used effectively on appeal. This is especially true when one considers that an appellate hearing, dealing mainly with questions of law, is normally within the province of an attorney.

Since the *Griffin* case there has been only one case decided which would

³⁹ *Commonwealth v. Agoston*, 364 Pa. 464, 480, 72 A. 2d 575, 583 (1950). The Court went on to say: "It is well-known that the 'secret which the murderer possesses commences to possess him' and that his guilty conscience exerts a tremendous pressure on his vocal faculties. This is especially true when shortly after the crime's commission there is a let down in the criminal's nervous energy and remorse is in the ascendant. If a criminal, desiring to release his troublesome secret, is to be frustrated by action of the state in providing him at the time with an advocate who will counsel silence, the number of unsolved American murders will be greatly augmented, for he who plans a murderous assault does not plan to have it witnessed by anyone except the victim, and *his* lips, the felon quickly and permanently seals."

⁴⁰ Beany, *The Effective Assistance of Counsel*, FUNDAMENTAL LAW IN CRIMINAL PROSECUTIONS 39 (1959).

⁴¹ *United States v. Sevilla*, 174 F. 2d 879 (2d Cir. 1949).

⁴² *Lovvorn v. Johnson*, 118 F. 2d 704 (9th Cir.), *cert. denied*, 314 U.S. 607 (1941).

⁴³ 351 U.S. 12 (1956).

indicate the direction towards which the Court is heading on this particular aspect of appointment of counsel. In *Johnson v. United States*,⁴⁴ an indigent defendant appealed a trial judge's certification that his appeal was taken in bad faith. Such a certification would have prevented him from obtaining a free transcript, *i.e.*, appealing *in forma pauperis*. The Court of Appeals held that the defendant had no constitutional right to the appointment of counsel on an appeal. Judge Frank, dissenting, argued that the *Griffin* doctrine required that an attorney be appointed for the defendant. The Supreme Court reversed and held, *per curiam*, that counsel must be appointed to assist the defendant in preparing an appeal to contest the trial judge's procedural ruling.⁴⁵ Unfortunately, no reason for the decision was given. It could be, as one court contends,⁴⁶ that the decision may well be grounded in some peculiar feature of the federal *in forma pauperis* procedure. Nevertheless, the case is an indication, however slight, of the direction in which the Court seems headed.

B. State Procedure

There is no general rule regarding the appointment of counsel to aid a defendant in prosecuting an appeal where the conviction was in a state court. Some state courts have been reluctant to make such an appointment a matter of right because there would be a heavy burden placed upon the bar if it was assigned to work on a deluge of appeals,⁴⁷ while others feel that they are without power to do so,⁴⁸ and still others because of *stare decisis*.⁴⁹ However, a few courts, noting that the right to appeal would be illusionary in most instances without appointment of counsel, have ruled that such appointment is a matter of right where the defendant is unable to otherwise secure counsel.⁵⁰ The Wisconsin Supreme Court has taken the position that appointment of counsel is a matter of right where there are reasonable grounds for appealing, and appointment of counsel had been made in the trial court.⁵¹ Several states have enacted statutes which provide for the appointment of counsel for prosecuting an appeal in capital cases.⁵² Illinois by statute provides that the public defender in

⁴⁴ 238 F. 2d 565 (2d Cir. 1956), *rev'd*, 352 U.S. 565 (1957).

⁴⁵ *Johnson v. United States*, 352 U.S. 565 (1957).

⁴⁶ *People v. Breslin*, 8 N.Y. 2d 73, 149 N.E. 2d 85 (1958).

⁴⁷ *Ibid.*

⁴⁸ *State v. Delaney*, 332 P. 2d 71 (Ore. 1958).

⁴⁹ *State v. Garcia*, 144 La. 435, 90 So. 649 (1919).

⁵⁰ *State v. Youngblood*, 225 Ind. 377, 75 N.E. 2d 551 (1947).

⁵¹ *Cundy v. State*, 244 Wis. 506, 12 N.W. 2d 681 (1944); *State v. Hudson*, 55 R.I. 141, 179 Atl. 130 (1935).

⁵² MISS. CODE ANN. § 2505 (1961); TEX. REV. CIV. STAT. art. 494 a (1960); KAN. LAWS ch. 282 (1951).

both capital and non-capital cases shall "prosecute any writ of error or other proceeding in review which in his judgment the interests of justice require."⁵³

Several state courts have been confronted with the problem of whether the *Griffin* case imposes upon the state the duty of appointing counsel to aid the indigent defendant in his appeal in addition to the duty of providing a transcript of the records. Thus far courts which have considered the question have unanimously held that there is no such duty.⁵⁴ However, it has been held that the Federal Constitution requires the assignment of appellant counsel where the state is unable to provide a transcript of the record of the trial.⁵⁵

CONCLUSION

It has been thirty years since *Powell v. Alabama*.⁵⁶ Today it would seem almost inconceivable that the highest court of a state would sanction a conviction as this:

The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with special horror in the community where they were to be tried, were put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.⁵⁷

We have made considerable progress since the *Powell* decision. Today in our federal courts a person accused of a crime must be told of his right to counsel at his arraignment, and if he is unable to retain an attorney, the court will appoint one for him. Many states have adopted similar procedures.

It should be noted, however, that even in federal courts the right to counsel is an absolute right only at the arraignment and trial stages. In many states an indigent has no absolute right to appointed counsel (not even at the trial stage) if the crime which he is accused of does not carry the penalty of death. Thus while progress has been made, there is still much to be done.

⁵³ ILL. REV. STAT. ch. 34, § 5604 (1961).

⁵⁴ *People v. Breslin*, 4 N.Y. 2d 73, 149 N.E. 2d 85 (1958); *State v. Delaney*, 332 P. 2d 71 (Ore. 1958); *Brown v. State*, 171 N.E. 2d 825 (Ind.), *cert. denied*, 361 U.S. 936 (1961); *People v. Bly*, 191 Cal. App. 352, 12 Cal. Rptr. 542 (1961).

⁵⁵ *People v. Kalan*, 2 N.Y. 2d 278, 140 N.E. 2d 357 (1957).

⁵⁶ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁵⁷ *Id.* at 57-58.